Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Leased Commercial Access	)	**MB Docket No. 07-42**
	)	
Development of Competition and Diversity in Video Programming Distribution and Carriage	)	

COMMENTS OF SHOP NBC

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ValueVision Media, Inc., d/b/a Shop NBC ("Shop NBC"),[1] respectfully submits these comments pursuant to the Commission's public notice in the above-captioned proceeding, released June 15, 2007.[2]

Introduction and Summary

The Notice in this proceeding reflects growing concerns about the viability of cable leased access under the rules established by the Commission in 1997.[3] Thirty-five years ago, in

[1] Shop NBC was initially incorporated under the name of ValueVision International, Inc. It participated extensively in the Commission's earlier leased access rulemaking proceedings (MM Docket No. 92-266) under that name. *See ValueVision Int'l, Inc. v. FCC*, 149 F.3d 1204 (D.C. Cir. 1998). The corporation changed its name to ValueVision Media, Inc. in 2002. It has been using the Shop NBC brand name since 2001, pursuant to an exclusive licensing agreement with NBC Universal entered into in November 2000.

[2] FCC 07-18 (rel. June 15, 2007) ("Notice").

[3] Second Report and Order and Second Order on Reconsideration of the First Report and Order, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Leased Commercial Access*, 12 FCC Rcd 5267 (1997) ("Second Report and Order"). These rules are codified at 47 C.F.R. §§ 76.970 *et seq.*

response to recommendations by the Sloan Commission,[4] the Commission identified leased access as a valuable tool for promoting diverse sources of video programming.[5] Unfortunately, the Commission's leased access regime has still failed to accomplish the diversity and competition goals that both the agency and later Congress have identified for it. As Commissioner Adelstein noted last year in his separate statement in the Adelphia merger proceeding, ". . . while it was widely recognized that cable operators had the incentive and ability to prefer their own programming, or the programming of another operator, rather than an independent programmer, the Commission's pricing regime and complaint process have not facilitated the use of leased access."[6]

In response to criticisms of the Commission's leased access regime, raised by the Media Access Project and others in that proceeding, the Commission has now determined to address these concerns. Shop NBC applauds this new "opportunity to revitalize a moribund program, so that it can reach the potential Congress envisioned."[7] Under the "average implicit fee" rate formula adopted by the Commission in 1997 (over the strenuous objections of the Media Access Project, the Community Broadcasters Association, Shop NBC, and a number of other independent programmers), leased access remains unaffordable to large and small independent programmers alike. If that formula once was viewed as a reasonable first effort to cap leased access rates, it has now been demonstrated after ten years of experience to have been an abject failure. It has precluded the Commission from discharging its statutory responsibility under the

4 *See* Sloan Commission on Cable Communications, On the Cable: The Television of Abundance 42-43, 148 (1971).

5 *See Cable Television Report and Order*, 36 F.C.C.2d 141, 191-92, *on recon.,* 36 F.C.C.2d 326, 356-57 (1972), *aff'd sub nom. ACLU v. FCC,* 523 F.2d 1344 (9th Cir. 1975).

6 *Adelphia Communications Corp.,* 21 FCC Rcd 8203, 8372 (2006).

7 *Id.*

1992 Cable Act to "ensure that [leased access] channels are a genuine outlet for programmers."[8] It is unverifiable. It is overly complex. And it substantially overcompensates cable operators, even for their opportunity costs. In these circumstances, the Commission is obligated to reform or replace it.

As shown below, nothing in the Cable Act prevents the Commission from doing so in order to satisfy the statutory mandate to transform leased access into the "genuine outlet" contemplated by Congress. Indeed, in light of the nearly universal deployment of and accelerating subscription to digital cable service (which has multiplied considerably the number of channels available to cable subscribers), there is even less basis today for maintaining a rate formula premised on mere speculation about the possible loss of analog subscribers. In these circumstances, where after ten years the current rules are demonstrably failing to serve their statutory purpose, the Commission is *obligated* to revisit them.

Whatever rate formula the Commission ultimately establishes for carriage on analog tiers, the Commission should also prescribe leased access rates for programmers who choose to lease channels on a digital tier that appropriately reflect the significantly lower per channel value of digital channels. Finally, the Commission should strengthen its existing rules about channel position for leased access programmers, to ensure that they are not confined to analog or digital channels in "cable Siberia."

I. THE AVERAGE IMPLICIT FEE RATE FORMULA HAS PREVENTED LEASED ACCESS FROM SERVING AS THE "GENUINE OUTLET" THAT CONGRESS INTENDED, OVERCOMPENSATES CABLE OPERATORS, AND REQUIRES SIGNIFICANT REFORM.

As noted by commenters in the Adelphia proceeding, despite the mandate of the 1992 Cable Act to transform leased access into a "genuine outlet" for independent programmers,

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8 S. Rep. No. 102-92, at 79 (1991).

leased access continues to be unaffordable and therefore rarely used, at least where cable operators choose to exercise their right to charge leased access programmers under the average implicit fee formula.[9] Recent comments from other independent programmers in response to the Notice in this proceeding have confirmed that the average implicit fee places leased access "beyond the reach of most parties,"[10] is "prohibitively expensive for a small locally owned business,"[11] and is unaffordable on a full time basis.[12] Thus, according to the Commission's most recent annual survey, cable systems on average carry only 0.7 leased access channels.[13]

Shop NBC's experience confirms these observations. Prior to the Commission's adoption of the earlier highest implicit fee formula, Shop NBC had negotiated leased access agreements with a number of cable systems at rates averaging a little less than $1.00 per subscriber per year. Following adoption of that formula, cable operators began quoting rates that were *six to eleven times that high.*[14] In 1997, after the Commission reduced leased access rates modestly, from the highest to the average implicit fee, Shop NBC once again engaged in a comprehensive review of available rates under the new formula. What it found were rates that still were in the range of $4.00 per subscriber per year. These rates were well above those that were affordable – and three or four times higher than those being charged per subscriber to then-

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9 *See* Petition to Deny of Free Press *et al.* at 42 (July 21, 2005) (MB Docket No. 05-192). *See also* Ex Parte Filing, Jan. 12, 2006; Petition to Deny of The America Channel at 56 (July 21, 2005).

10 Ex parte presentation of Community Broadcasters Association at 2 (July 20, 2007).

11 Comments of iNFO Channel Group at 1 (July 31, 2007).

12 Comments of Mary R. Silver/KVHC-LP (e-mail filed June 28, 2007).

13 Report on Cable Industry Prices, *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992: Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, 21 FCC Rcd 15087 att. 9 (2006) ("2006 Cable Industry Prices Report"). Even this figure, which is self-reported by cable operators, is likely overstated. It does not reflect whether channels are used on a full-time basis, and it does not indicate whether carriage is at a negotiated rate, without regard to the average implicit fee.

14 Supplement to Petition for Reconsideration at 3-4 (Nov. 23, 1993) (MM Docket No. 92-266).

cable-affiliated programmers QVC and HSN (which offer similar programming).[15] Accordingly, Shop NBC no longer had any reason to pursue the possibility of invoking leased access rights. Until and unless leased access rates fall within the range of $1 to $2 per subscriber per year on the analog expanded basic tier (depending upon the demographics of a particular market), they will continue to be prohibitively expensive.

The principal reason why leased access is "moribund"[16] is the Commission's "average implicit fee" rate formula. This formula has all of the conceptual flaws originally identified by Shop NBC and others over ten years ago – many of which the Commission explicitly recognized in its 1997 Second Report and Order.

The implicit fee concept, which was originally proposed by NCTA, Comcast, TCI, and Time Warner,[17] is based upon the erroneous assumption that all programmers *receive* rather than *pay* money for carriage.[18] Even if it were correctly applied, the average implicit fee formula would consistently overcompensate cable operators. The average implicit fee reflects the *average* value of a channel to the cable operator. It thus requires the leased access programmer to pay the operator more than some other programmers do, simply because it is an average. Stated another way, it permits the cable operator to replace its least profitable channel with one for which it is entitled to charge a higher rate.

An example will illustrate this problem. Assume for simplicity that a cable operator has only three channels, all on the same tier. One provides the operator with $5 per subscriber in net

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15 Ex parte presentation, May 16, 1995 (MM Docket No. 92-266).

16 *See* page 2 *supra*.

17 Report and Order and Further Notice of Proposed Rulemaking, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation,* 8 FCC Rcd 5631 ¶ 507 (1993).

18 *See* Petition for Reconsideration of ValueVision International, Inc. at 4 (June 21, 1993) (MM Docket No. 92-266), *quoting* S. Besen, Analysis of Cable Television Rate Regulation at 54 n.50 (attachment to Comments of TeleCommunications, Inc.) (implicit fee is "amount the cable operator retains . . . after making all required payments to the programmer").

revenue (i.e., revenue minus programming cost); another, with \$10; and a third, with \$15. The average implicit fee in this case would be \$10. Thus, for a leased access programmer entitled to carriage, the operator would be permitted to drop its least profitable channel (the \$5 one) and have the leased access programmer pay twice that profit (\$10).[19]

The average implicit fee formula is also enormously complex and lacks transparency. One cable operator has advised a leased access programmer that rates under the formula "would take a full 30 days to calculate."[20] Indeed, it is so complicated that the Commission included a separate Appendix C to the Second Report and Order to demonstrate how the six-step calculation works.[21] The key inputs to the formula are completely unverifiable, i.e., the subscriber revenues that a cable operator obtains, and the programming costs it pays, with respect to each channel on each eligible leased access tier.[22] The problem is compounded by the large number of affiliated programmers carried by most cable MSOs, because under the rate formula cable operators are entitled to calculate the programming costs for these affiliated channels based on their (again undisclosed) estimate of "the prevailing company prices offered in the marketplace to third

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19 Of course, the best evidence about the affordability of leased access and its overcompensation of cable operators lies in the hands of large cable MSOs. To the extent the Commission has any doubts about these issues, it should obtain from Comcast, Time Warner, Cox, Charter, and Cablevision (on a random sample basis) information as to how much of their leased access capacity is filled on a full- and part-time basis. To gauge the affordability of leased access under the current rules, the Commission should also require these samples to compare the system's average implicit fee rate for a full-time leased access channel to its charges to other *nonaffiliated* programmers that pay for carriage.

20 Comments of James Smith at 3 (July 20, 2007). The rules require cable operators to provide such rate information within 15 days. 47 C.F.R. § 76.970(i). The lack of any such ready information in this case suggests how rare it is that the operator even receives leased access inquiries.

21 Second Report and Order app. C.

22 *See* Comments of iNFO Channel Group, *supra,* at 3 ("We have never been provided any justification for the calculation of the cost of our channel lease. . . . We have never been provided with subscriber numbers . . . .).

parties."[23] To challenge these figures, a programmer must retain at least one and generally two independent accountants.[24]

In adopting the average implicit fee formula ten years ago, the Commission recognized the very real problem that it could overcompensate cable operators, even for their opportunity costs. Its response was to note the *possibility* that leased access programming would be so much less appealing to subscribers than the least appealing programming for which it would be substituted "that viewership of the other programming on the tier will be adversely impacted."[25] However, the Commission did not actually accept this argument, or relate it to the extent of overcompensation the formula permits. Indeed, it noted the statutory finding about cable operators' incentive to select these other channels not for "marketing reasons," but instead to "restrict . . . editorial content" and "thwart competition to the operator's chosen programming."[26] It thus could not "predict with any certainty what the relative value of the leased access programming will be," noting the possibility that it could either be more or less than what it replaces.[27] Nevertheless, the Commission endorsed a formula resulting in the significantly higher leased access rates described above, with little more than an unsupported hope that "any potential excess recovery generally will be minimal."[28]

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23 47 C.F.R. § 76.970(e).

24 *Id.* § 76.975.

25 Second Report and Order ¶ 38.

26 *Id.*¶ 40 & n.106.

27 *Id.* ¶ 40. Indeed, Shop NBC and other independent programmers provided anecdotal evidence that their programming did not adversely affect viewership. *Id.* ¶ 37.

28 *Id.* ¶ 42. The Commission premised its hope that excess recovery would be minimal on the view that "on average, subscribers will not be willing to pay as much for new leased access programming as they do for new programming selected by the cable operator." *Id.* ¶ 42. Yet this was the very argument that, as noted above, it had earlier refused to take a position on one way or the other.

In 1997, the Commission explicitly undertook to revisit the availability of leased access at a future date.[29] And whatever the case for subscriber loss from leased access channels may have been on *analog* cable systems ten years ago, today at least 96% of all homes passed by cable offer digital cable service,[30] which includes from over 200 to 300 channels.[31] More than half of all cable subscribers now subscribe to these digital services,[32] and digital penetration can be expected to increase significantly as the DTV transition approaches. As Comcast has recently made plain, for example, ". . . it has every intention of migrating its cable systems to all-digital networks."[33]

In light of this migration to digital service, the Commission can no longer rely on its prior speculation about subscriber loss. The prospect of losing subscribers because of the replacement of the least popular sliver of these much more extensive digital channel lineups with leased access channels is no longer realistic. It is no less remote than the prospect of losing subscribers because the operator offers dozens of other obscure channels of absolutely no interest to them. Households receiving more than 70 networks only watch, on average, about 17 of them.[34] Indeed, in opposing a la carte proposals, the cable industry has repeatedly touted the virtues of

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[29] Second Report and Order ¶ 31: "We will, however, continue to monitor the availability of leased access channels and may revisit this issue if it appears that the average implicit fee formula no longer reflects a reasonable rate."

[30] Twelfth Annual Report, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 21 FCC Rcd 2503 ¶ 51 (2006) (2004 data).

[31] *See* Comments of NAB/MST at 14 (July 16, 2007) (CS Docket No. 98-120), citing M. Arden & S. Schatt, Cable Television Infrastructure: Headend, Plant, Spectrum, Backhaul, STB and Revenue Analysis, ABI Research (2007) (300 digital channels in a typical 750 MHz system). The websites of Comcast and Time Warner both state that their digital services include "over 200 channels." *See* http://64.233.169.104/search?q=cache:GjejoA2ixxEJ:snltranscripts.jt.org/cable/comcast-cable-tv-deals-.html+digital+cable+chan…; http://www.timewarnercable.com/corporate/products/digitalcable/digitalcabledetailspage.html.

[32] As of June 2007, according to NCTA, 35.255 million of 65.5 million cable subscribers subscribe to digital cable. http://www/ncta/com/ContentView.aspx?contentId=58.

[33] Application for Review at 20 (Jan. 20, 2007) (CSR-7012-Z; CS Docket No. 97-80).

[34] GAO, Issues Related to Competition and Subscriber Rates in the Cable Television Industry at 31 (Oct. 2003) (citing 2000 Nielsen Media Research Report).

tier packages that include channels that "subscribers do not watch" and "don't want."[35] It has maintained that subscribers are like newspaper readers, who very possibly "will each find particular parts of the paper . . . objectionable."[36]

In these circumstances, and in light of its catastrophic effect on prospective leased access programmers over the past ten years, the Commission should abandon or substantially revise the average implicit fee structure. There are a variety of other cost-based approaches that the Commission could consider instead. One alternative, proposed by the Commission in 1996, would be a rate that recovers the cable operator's net opportunity costs of "bumping channels to accommodate leased access programmers."[37] Another option, proposed by Shop NBC in the prior leased access proceedings based on rates paid by non-leased access programmers,[38] would be to establish a flat rate per subscriber per month, based upon a Commission estimate of the marginal value to cable operators received from other unaffiliated programmers. Such a rate would be simple to administer, a virtue the Commission has repeatedly recognized in other complex rate regulation proceedings.[39] Moreover, it could be implemented as merely a floor; cable systems could charge more upon a demonstration that their actual costs entitled them to

35 Comments of NCTA at 5-6, 20 (July 15, 2004) (MB Docket No. 04-207). *See also* Response of NCTA to Staff Further Report on A La Carte at 19 (Mar. 15, 2006) (MB Docket No. 04-207).

36 Comments of Charter Communications, Inc. at 6 (July 15, 2004) (MB Docket No. 04-207). *See also Cablevision Sys. Corp.,* 11 FCC Rcd 12669, 12675 (1996): "We note that cable operators add and delete cable programming services from time to time, and at their own discretion, without imposing an undue burden on subscribers' viewing habits."

37 Order on Reconsideration of the First Report and Order and Further Notice of Proposed Rulemaking, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation: Leased Commercial Access,* 11 FCC Rcd 16933, 16938 (1996). While the Commission's proposal was more complex in concept by also including recovery of operating costs, the proposal treated subscriber revenue as a proxy for operating cost, thereby obviating the need to calculate these costs. *See id.* at 16963-68 (describing proposal).

38 Ex Parte Presentation, Oct. 2, 1996 (CS Docket No. 96-60).

39 First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* 11 FCC Rcd 15499, 15883 ¶¶ 767 *et seq.* (1996); *Implementation of the Pay Telephone Reclassification and competition Provisions of the Telecommunications Act of 1996,* 11 FCC Rcd 20568, 20601 ¶¶ 119 *et seq.* (1996).

higher rates. But it is clear, based upon the experience of the last ten years, that the current rate formula warrants substantial change.

To be sure, reforming the average implicit fee formula in order to address its fundamental failure would require the Commission to revisit the uncertain predictions made in its Second Report and Order in 1997. But while the D.C. Circuit upheld that order as "well within the 'zone of reasonableness' required to survive judicial review,"[40] it did not etch the Commission's initial leased access rate formula in stone. Quite the contrary. It is a well established principle of administrative law that the Commission is obligated to reexamine its rules where it appears they no longer serve the public interest.[41] As the Supreme Court cautioned in *Chevron*, "to engage in informed rulemaking, [an agency] must consider varying [statutory] interpretations and the wisdom of its policy on a continuing basis."[42] Where the current rules are not achieving their purpose, and where the uncertain prospect of subscriber loss from leased access on an analog tier has now been overtaken by the availability of digital tiers offering a far wider array of program services, the Commission has an obligation to address the problem.

II. NOTHING IN THE CABLE ACT PREVENTS SUCH NEEDED RATE REFORM.

In the Notice, the Commission asks how any such changes to the average implicit fee formula "would better serve Congress' statutory objectives in a legally sustainable way." Notice ¶ 8. As noted above, by making leased access affordable, while also permitting the cable operator to recoup its net opportunity costs, the Commission would be promoting the principal statutory objective of the leased access reforms in the 1992 Cable Act. It would cap rates in a

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40 *ValueVision Int'l, Inc. v. FCC,* 149 F.3d 1204, 1212 (D.C. Cir. 1998).

41 *See, e.g., Cincinnati Bell Tel. Co. v. FCC,* 69 F.3d 752, 768 (D.C. Cir. 1995); *Geller v. FCC,* 610 F.2d 973 (D.C. Cir. 1979)..

42 *Chevron U.S.A., Inc. v. NRDC, Inc.,* 467 U.S. 837, 863-64 (1984).

way that finally permits leased access to serve as the "genuine outlet" for independent programmers that the Commission and Congress have long contemplated. It would thus give "real and substantial effect" to the amendment made by Congress in the 1992 Cable Act, which has until now been rendered a completely dead letter.[43]

In its Second Report and Order in 1997, the Commission appears to have accepted the average implicit fee formula (despite its acknowledged limitations at the time) because of language in the statute that provides that leased access rates shall be "at least sufficient to assure that [leased access] will not adversely affect the operation, financial condition, or market development of the cable system."[44] As noted above, in light of the failure of this formula over the course of the past ten years, and the changes in the cable industry since that time, the Commission has an obligation to review how the formula now comports with the statutory mandate. Nor would the Commission's determination to do so deprive its application of the statute to these new circumstances of the deference to which it would otherwise be entitled. As the Supreme Court held in *Brand X*, such "change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency."[45] And a review of the history of the leased access provision of the Cable Act makes clear that it requires revising the current formula to make it work in light of the experience gained over the past ten years.

It is important to understand that the language identified by the Commission in its 1997 decision originated in the 1984 Cable Act and was significantly amended in the 1992 Cable Act.

43 *Stone v. INS,* 514 U.S. 386, 397 (1995).

44 47 U.S.C. § 532(c)(1).

45 *NCTA v. Brand X Internet Services,* 545 U.S. 967, 981 (2005), *quoting Smiley v. Citibank (South Dakota), N.A.,* 517 U.S. 735, 742 (1996). *See also Rust v. Sullivan,* 500 U.S. 173, 186-87 (1991).

At the time of the 1984 Act, the cable industry was still in its "adolescence";[46] cable operators were only beginning to build systems in major markets.[47] The congressional solicitude for the "operation, financial condition, [and] market development" of cable cannot be divorced from this context, and or read as an absolute bar on the mere possibility of limiting cable operators' revenue streams. Rather, as the House report made clear, Congress intended this language to safeguard the "financial viability" of a nascent industry still very much in its initial deployment stage.[48] In its 1997 order, the Commission appears to have recognized as much.[49]

After all, this section of the 1984 Act was designed to *reimpose* leased access requirements, after the Supreme Court had invalidated them as beyond the Commission's then existing statutory authority over broadcasting.[50] And while acting to safeguard the "operation, financial condition, [and] market development" of cable systems, Congress also cautioned that rates for leased access should "encourage, and not discourage," its use; thus, a rate that "has the result of deterring all use . . . may provide a basis for determining" whether it is reasonable, as required under the statute.[51] Consistent with the 1984 Act's purpose to promote the pending rollout of cable infrastructure, Congress also noted that "as the cable industry more fully develops, and programming industry desires for pursuing leased access opportunities more fully emerge, new and different requirements relating to leased access may be necessary in order that a

46 H.R. Rep. No. 98-934, at 30 (1984).

47 S Rep. No. 98-67, at 5 (1983). At the time, projections were that only half of all U.S. homes would be passed by cable by 1990. *Id.* In January 1985, cable penetration was only at 37% of all television homes. H.R. Rep. No. 101-682, 27 (1990).

48 H.R. Rep. No. 98-934, at 50 (1984).

49 Second Report and Order ¶ 11 (quoting the House Report's "financial viability" standard).

50 H.R. Rep. No. 98-934, at 36 (1984), citing *FCC v. Midwest Video Corp.,* 440 U.S. 689 (1979).

51 *Id.* at 51.

nationally mandated leased access scheme fully meet the First Amendment goal of assuring diversity."[52]

That subsequent course correction was precisely the purpose of the 1992 Cable Act. Once again, context is important. Pursuant to a requirement imposed in the 1984 Act, the Commission had submitted a report to Congress in 1990 on the status of leased access (and other provisions of the new law).[53] There is a certain *déjà vu* in that report – and a sense of unfulfilled promise. The Commission found that "[m]ost cable operators have the ability to deny or unfairly place conditions on the access of most program services to the cable communities they serve."[54] It cited accounts that leased access programmers had experienced "difficulty in gaining carriage," and that "cable operators have established unreasonable terms."[55] In light of growing concerns about cable operators' discrimination against unaffiliated programmers competing for revenues with affiliated cable channels, the Commission recommended that Congress modify the leased access section of the 1984 Act to include the goal of promoting competition (in addition to diversity). Such an amendment, it believed, would eliminate potential obstacles in "the rate setting process" and "make it inappropriate to retain the deference given to cable operator[s]" over leased access rates.[56]

In the 1992 Cable Act, Congress implemented that Commission recommendation on leased access – and more. First, it amended the leased access section of the 1984 Act, as the FCC had suggested, to add an additional purpose: "to promote competition in the delivery of

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52 *Id.* at 54.

53 *Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service,* 5 FCC Rcd 4962 (1990).

54 *Id.* at 4973.

55 *Id.* at 5046, 5048.

56 *Id.* at 5047, 5051.

diverse sources of video programming."[57] Second, recognizing that the principal reason for failure of leased access had been the cable operator's authority over "price and conditions,"[58] it directed the FCC to impose maximum rates, terms, and conditions.[59] Third, it modified the 1984 Act's solicitude for "the operation, financial condition, [and] market development" of cable systems, by inserting into that language a requirement that leased access rates, terms, and conditions also be consistent with both the newly expanded "purpose of this section" and with these new Commission rules.[60]

These changes provide the Commission with broad discretion – indeed, with a statutory mandate – to take action finally to make leased access the "genuine outlet" that both it and Congress have now long intended it to be. Indeed, they were a direct response to, and specifically cited, the Commission's own 1990 criticism of the dearth of leased access following the 1984 Act. Congress agreed that "leased access has not been an effective mechanism for securing access for programmers," and it enacted reforms that included a rate cap specifically designed to "make leased access a more desirable alternative" for them.[61] These reforms require the Commission to consider the foregoing changes to the average implicit fee formula in light of the abject failure of the Commission's existing leased access rules, after ten years, to accomplish that statutory purpose. Implementing such changes would be a simple matter of adhering to the

57 Pub. L. No. 102-385, 106 Stat. 1460, 1484 (*codified at* 47 U.S.C. § 532(a)).

58 H.R. Rep. No. 102-628, at 39 (1992).

59 Pub. L. No. 102-385, 106 Stat. 1460, 1484-85 (*codified at* 47 U.S.C. § 532(c)(4)).

60 *Id.* at 1484-86 (*codified at* 47 U.S.C. § 532(c)(1)).

61 H.R. Rep. No. 102-628, at 39-40 (1992). *See also* S. Rep. No. 102-92, at 64 (1991) (leased access had "been used rarely").

well established presumption that "[w]hen Congress acts to amend a statute . . . it intends its amendment to have real and substantial effect."[62]

III. THE COMMISSION SHOULD ESTABLISH RULES GOVERNING RATES FOR LEASED ACCESS PROGRAMMERS SEEKING CARRIAGE ON A DIGITAL TIER.

The Notice also seeks comment on whether the introduction of digital signal processing and signal compression technologies "affects channel capacity and channel count for purposes of the calculation of carriage obligations and average rates." Notice ¶ 9. This issue is clearly timely. As noted above, virtually all cable homes now have access to digital video services, and cable operators are rapidly migrating their subscribers to digital tiers.

However the Commission determines to approach the reform of the average implicit fee formula as applied to analog services, it should ensure that leased access rates for digital tiers are substantially lower. Of course, digital tiers have lower subscriber penetration, so for those digital tiers that are subject to leased access obligations[63] the rates should be lower. But even measured on a per subscriber basis, there are significant differences between analog and digital tiers that should lead to a substantial discount, in the range of 50%, for the latter. First, channels on digital tiers include niche services with lower audience ratings. Second, because there are many dozens, if not hundreds, of additional channels on the basic digital tiers, the benefits to niche channels of being introduced to new subscribers through channel surfing (touted so heavily by cable operators in the a la carte dispute) are much less significant. Third, because they consume only a fraction of the bandwidth of analog channels, the per channel cost of digital

62 *Stone v. INS,* 514 U.S. 386, 397 (1995). *See also Pierce County v. Guillen,* 537 U.S. 129, 145 (2003).

63 Leased access programmers are entitled to be placed only on a tier with subscriber penetration in excess of 50%. 47 C.F.R. § 76.971(a)(1). The current rules permit the cable operator to place a leased access programmer on any such tier, and the Notice asks (at ¶ 10) whether to revise this approach. This rule is open to substantial abuse given the wide array of sports and other tiers now available on digital cable systems. The Commission should revise the rule to permit *the programmer* to elect carriage on any tier with greater than 50% penetration.

channels to the cable operator is far less. These factors are all borne out by the substantially lower subscriber rates associated with digital services.[64] Given the substantially lower net opportunity cost associated with channels on such tiers, the Commission should ensure that cable operators permit a substantial discount for leased access channels on digital tiers.

IV. THE COMMISSION SHOULD STRENGTHEN ITS CHANNEL POSITIONING PROTECTIONS FOR LEASED ACCESS PROGRAMMERS.

As the Commission notes, the current rules permit cable operators to make "reasonable selections" in placing leased access programmers at specific channel locations. Notice ¶ 10, quoting 47 C.F.R.§ 76.971(a)(2). The Notice seeks comment whether this rule should be reformed.

Because of the difficulties of enforcing this requirement on a case-by-case basis, Shop NBC believes that the Commission should amplify the rule by making clear that certain cable operator practices are deemed per se unreasonable. First, a number of cable systems have assigned Shop NBC a channel position in the 95-99, 00-01 range. This has been problematic, because of the number of television sets (including second sets in a household) that cannot tune to these frequencies without extra expense being invested in the TV's tuner. In these cases, Shop NBC has experienced substantial decreases in sales – and substantial increases in viewer complaints about transmission quality.[65] Second, the Commission should make clear that putting leased access programmers in a collective "cable Siberia," where they cannot easily be located by subscribers, is inherently unreasonable. Given the incentives that the operator has to

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[64] As of January 2005, expanded basic service averaged 70.5 channels for $43.04, or 61.0 cents per channel. Digital service added 33.7 channels for $12.99, or 38.5 cents per channel. 2006 Cable Industry Prices Report atts 2-3. To the extent this self-reported data about digital channels reflects bandwidth rather than the multiple services that can be transmitted over a single channel, it overstates the per channel charges for digital services.

[65] Shop NBC's experience is not unique. *See* Comments of iNFO Channel Group at 2 (Comcast's placement of programmer on channel 95 resulted in substantially lower quality signal).

discriminate against unaffiliated programmers, these protections are warranted in order to ensure that leased access becomes the "genuine outlet" that Congress intended.

Conclusion

For the foregoing reasons, the Commission should replace the average implicit fee formula with a rate structure for commercial leased access that finally establishes it as the "genuine outlet" for independent cable programmers that Congress intended. It should address the movement of cable systems to digital services since 1997 by ensuring that programmers who choose to accept leased access on digital tiers pay significantly lower rates reflecting the lower value of channels on those tiers. And it should strengthen the current requirement that cable operators' channel selections for leased access programmers be reasonable.

Respectfully submitted,

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